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No. 96-1442

In The

Supreme Court of the United States

October Term, 1996

SOUTHERN COMPANY SERVICES, INC.,

Petitioner,

vs.

SUE PRITCHARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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This case is not one which should be reviewed by this Honorable Court. It does not present a unique application of the law nor does it conflict with prior precedent. Moreover, Petitioner, (hereinafter SCSI) in an attempt to capture the attention of this Court, raises several new issues not considered by the court below. Since the Eleventh Circuit's holding merely involves a common application of Rule 56 of the Federal Rules of Civil Procedure, wherein the court correctly held that Respondent (hereinafter Pritchard) had presented sufficient evidence to create a genuine issue of material fact on the existence of her disability, this Court should deny the Petition for Writ of Certiorari. As a result, this Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

To the extent necessary to present a more accurate overview of the critical issues before this Court, Pritchard offers the following additions and/or corrections to SCSI's statement of the case.

As noted, Pritchard held several positions while employed by SCSI.[1] In May 1991, Pritchard transferred to the Quality Assurance Department ("QA") to work as an Engineer I. There, Pritchard was largely responsible for conducting audits on nuclear power generating plants to assure regulatory safety compliance. On each of the occasions that Pritchard transferred while at SCSI, Pritchard did so without formally executing any transfer and/or application request. R-3-61-1, p. 1; R-3-61-2, pp. 42, 45, 49, 51-52, 54-55, 60-61, 63-65, 106-107, 120-125.[2]

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1. While working at SCSI, Plaintiff preformed her duties well and she was either transferred or promoted several times. R-3-61-1, p. 2; R-3-61-3; R-3-61-4, pp. 104, 108; R-3-61-5, p.121.

2. This is significant because it demonstrates that SCSI has a practice of transferring employees without requiring the employee to execute any formal transfer request.

In 1990, Pritchard began to experience clinical depression. Pritchard's depression grew more severe during 1991 and 1992, and on May 1, 1992, she ultimately took a leave of absence on the advice of her treating psychiatrist, Dr. Neville. During her leave of absence, Pritchard was treated for major clinical depression and dysautonomia.[3] Until at least Pritchard's deposition in June 1994, she continued to experience the above medical conditions for which she took medication. Further, as will be explained below, from 1992 until her termination in June 1993, Pritchard's disability substantially limited her ability to communicate, concentrate, care for herself, and to function in a variety of other areas. R-3-61-1, p. 3; R-3-61-2, pp. 13, 96, 154-155, 186-188, 280-281; R-3-61-7; R-3-61-8.

Contrary to SCSI's assertion, there is no doubt that SCSI was well aware of Pritchard's disabilities. Carl Watts, manager of Employee Relations and Safety in SCSI's Human Resources Department knew that Pritchard had clinical depression which was significant enough to interfere with her ability to work. Additionally, both Prince, who was the Head of Human Resources, and Welliver, Manager of Quality Assurance and Research, were aware that the severity of Pritchard's depression interfered with her ability to work and both also perceived Pritchard as a person with a disability, as that term is defined by the ADA. This fact is significant because it was part of Watts' and Prince's job responsibilities to determine who the ADA protected, in order to assure that employees were reasonably accommodated and otherwise treated in a non-discriminatory manner. R-3-61-1, p. 4; R-3-61-2, pp. 177-180, 182-184; R-3-61-4, pp. 112, 123; R-3-61-5, pp. 101-102, 104; R-3-61-6, pp. 15, 42, 45-46, 51-55, 59-142.

By December 1992, Pritchard had improved sufficiently to be released to work by Dr. Neville, with certain limitations. Thus, at a

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3. Dysautonomia is a disfunction of the automatic nervous system. This condition causes Pritchard to experience fatigue, loss of sleep, irregular heartbeat, being hot or cold irregularly, diarrhea, heartburn, upset stomach, and tingling of the hands and feet. R-3-61-2, pp. 181-182.

1992 Christmas party, Pritchard informed SCSI that she was willing and able to return to work, so long as her duties did not include the performance of work in the nuclear field. R-3-61-1, p. 4; R-3-61-2, pp. 194-195, 206; R-3-61-10.

Significantly, until her termination in June 1993, Pritchard continued to express her willingness and strong desire to return to work by way of a transfer to any vacant position for which she was qualified. However, SCSI continually refused to even attempt to accommodate Pritchard, despite the expansive definition of "accommodation" under the ADA. SCSI's response to Pritchard's continued requests for a transfer was to require Pritchard to remain on an unpaid disability leave of absence in the event Pritchard's condition improved enough to allow her to return to her **former position** in Quality Assurance. Further, from the time Pritchard was released to work in January 1993, until her termination in June 1993, every time SCSI solicited information about Pritchard's disability, it was for the purpose of maintaining Pritchard on the unpaid disability leave. R-3-61-2, pp. 206-07; R-3-61-5, pp. 149, 193-197; R-3-61-6, pp. 108-109.[4]

On January 29, 1993, Pritchard was officially released to return to work, effective February 1, 1993, with the aforementioned restriction by Dr. Neville. Dr. Neville explained that the nuclear field "seems to have stress that was very difficult for Pritchard to cope with. Stress in that job situation seems to have contributed to her depression and decompensation requiring time off work." After receiving the letter from Pritchard, SCSI continued to refuse to reinstate Pritchard, but retained her on unpaid disability leave of absence. If SCSI was confused about Neville's seemingly clear restriction, it took no steps to clarify his meaning until June 10,

4. The record is replete with specific instances where, in response to Pritchard's attempt to return to work, SCSI required Pritchard to remain on unpaid disability. For example, on or about January 14, 1993, Prince contacted Pritchard, not to transfer her to a vacant position, but to secure a medical release for the purpose of continuing Pritchard on a disability leave of absence. R-3-61-1, p. 4; R-3-61-5, pp. 135-137; R-3-61-12.

1993. Even then, SCSI failed to take the steps necessary to secure any further information. R-3-61-1, p. 6; R-3-61-2, p. 206; R-3-61-5, pp. 146-147; R-3-61-7; R-3-61-10.

On January 29, 1993, Pritchard again contacted Prince in an effort to return work. During the conversation, Pritchard expressly indicated her strong desire to transfer to **any vacant position for which she was qualified.** The January 29, 1993, conversation between Pritchard and Prince ultimately created one of the most hotly debated issues in the litigation. During the conversation, Prince suggested that Pritchard was free to "apply" for other positions which were posted on SCSI's "job hotline." Confused, Pritchard asked Prince why she should "apply" for positions listed on the "hotline", since she was already employed by SCSI and the hotline was designed solely for "new hires." Pritchard told Prince that, consistent with her previous experiences with SCSI, transfers regularly occurred within SCSI without employees formally "applying" for a position. She also stated her understanding that many vacancies were not even listed on the hotline.[5] Finally, she asked for more information on what was expected of her. In response to Pritchard's questions, Prince retracted his previous suggestion regarding the hotline by responding that Pritchard should not "worry about it at this time." Instead, Prince instructed Pritchard to simply provide Prince with the aforementioned requested medical information to continue her disability leave and stated further that he would communicate later with Pritchard regarding any future employment opportunities. R-3-61-1, pp. 5-6; R-3-61-2, pp. 218-222; R-3-61-6, p. 73; R-3-61-5, pp. 189-191; R-3-61-6, pp. 134-136.

On February 15, 1993, Prince contacted Pritchard and told her that since Dr. Neville had recommended against returning to nuclear work, SCSI had no positions available for Pritchard. According to Prince, all of the engineering jobs required the

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5. Pritchard denies that her husband brought her home a listing of vacancies before her termination. R-3-61-1, p. 12.

"flexibility to accept nuclear assignments." Prince also told Pritchard that "management has approved to continue your DLOA (disability leave of absence) for 90 days to May 15." R-3-61-1, p. 7; R-3-61-2, pp. 25, 206-207, 226-227; R-3-61-15.

Pritchard vehemently denies that the so-called flexibility to accept non-nuclear assignment is an essential function for every engineering position. The Eleventh Circuit also stated that this issue would have to be resolved by a jury. SCSI is an extremely large and diverse corporation and a number of engineering positions exist which involve absolutely no and/or extremely limited nuclear work. This includes engineers who work with fossil fuel and hydroelectric generating plants, telecommunications, computing, environmental affairs, research, substations, transmission planning and design, materials procurement, and fuel procurement. Moreover, the engineering job description does not identify the so-called "flexibility to accept nuclear assignments" as a requirement. R-3-61-1, pp. 7-9; R-3-61-2, pp. 226-227; R-3-61-4, pp. 175, 178, 388-389; R-3-61-14; R-3-61-19.[6]

No one from SCSI contacted Pritchard during March or April 1993. In April 1993, Prince contacted Watts to inform him that Pritchard's 90-day unpaid disability leave of absence was about to expire. At this time, SCSI had failed, still to even attempt to transfer Pritchard. Prince then instructed Pritchard to have her physician execute a second statement of disability in order to continue to maintain Pritchard on unpaid disability leave. Accordingly, on April 4, 1993, Dr. Neville physician executed an "Attending Physician's Statement of Disability" which identified Pritchard as having major

6. For example, most of the work in Fossil/Hydro is non-nuclear. The engineers in Fossil/Hydro are not hired to perform nuclear work or for their expertise in the nuclear area. Finally, Prince could not identify any negative consequences of having an engineer in Fossil/Hydro who did not have the flexibility to perform nuclear work. These facts are important because they include the factors which must be considered when identifying the essential functions of any position. 29 C.F.R. § 1630.2(n). R-3-61-1, p. 7; R-3-61-4, pp. 197-199; R-3-61-5, pp. 162-164, 169-170, 176; R-3-61-6, p. 169.

clinical depression, recurrent, with low energy and nervousness, requiring medication on a daily basis. R-3-61-1, p. 7-8; R-3-61-2, p. 226; R-3-61-6, p. 110.

During May 1993, Pritchard continued to contact SCSI to communicate her strong desire to transfer to any vacant position. SCSI responded by requesting a more certain statement of disability in order to retain Pritchard on unpaid disability leave. R-3-61-1, p. 8; R-3-61-2, pp. 230-236, 248; R-3-61-5, p. 225; R-3-61-6, p. 132; R-3-61-19; R-3-61-21.

On May 17, 1993, Pritchard wrote to SCSI and reiterated her urgent need for a transfer to a vacant position. She also, again, challenged SCSI's assertion that all engineering positions at SCSI require either nuclear assignments or the flexibility to accept nuclear assignments, listing several areas within SCSI where no nuclear work is done. R-3-61-2, p. 212; R-3-61-19.

On May 24, 1993, Mr. Thomas E. Sanford, from the Employee Benefits Department of SCSI, sent Pritchard a letter outlining the process for Pritchard to apply for long-term disability. SCSI sent this letter despite Pritchard's statements that she was ready willing and able to return to work. On May 25, 1993, Dr. Neville, wrote SCSI again, reiterating that Pritchard was able to return to work, so long as it was not in the nuclear field. R-3-61-1, p. 10; R-3-61-23; R-3-61-24.

On June 10, 1993, Pritchard wrote to Prince seeking an update on her employment status. In response, Welliver set up a meeting with Pritchard, to be held on June 18, 1993. At that meeting, Welliver informed Pritchard that SCSI had decided to terminate Pritchard because Pritchard did not have the flexibility to work in the nuclear area. At this time, SCSI had never even attempted to place Pritchard in any vacant position. R-3-61-1, pp. 10-11; R-3-61-2, pp. 237, 240, 244; R-3-61-6, p. 189; R-3-61-25; R-3-61-26, pp. 2-7.[7]

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7. It is undisputed that several vacancies existed at SCSI between January (Cont'd)

Pritchard filed litigation challenging SCSI's failure to accommodate her and her subsequent termination. At the close of discovery, SCSI moved for a summary judgment, arguing that Pritchard did not have a disability within the meaning of the ADA. In response, Pritchard presented substantial evidence demonstrating a genuine issue of material fact on this point. The evidence included deposition testimony, an affidavit, and three declarations which described the significant impact Pritchard's impairments had on her ability to, *inter alia*, communicate, concentrate, care for herself, and function after December 1992. Specifically, Pritchard's affidavit stated:

> During my leave, up until the time of my termination, my disabilities substantially limited my ability to function. My symptoms included profound fatigue, difficulty sleeping and communicating, experiencing suicidal thoughts, uncontrollable crying and being limited in my ability to perform my former job classification of nuclear related engineering. In fact, from April, 1992 until January, 1993, I was unable to perform any work. I continue to take medication for my conditions.

Moreover, in her deposition, Pritchard described the significant symptoms she experiences as a result of her dysautonomia. R-3-61-1, p. 3; R-3-61-2, pp. 181-182.

(Cont'd)

and June 1993, which Pritchard would have been qualified to fill. These include two Electrical Designer positions, a Senior Designer position, two Integrated Resource Planning Analyst positions, a Telecommunications Engineer, and an Engineer Analyst position. All of these positions perform little or no nuclear work. R-1-61-1, pp. 7-12; R-3-61-4, pp. 361-365, 375-376, 385-386, 410; R-3-61-5, pp. 195-196, 300-302; B-291, 304-305, 307; R-3-61-27 through R-3-61-38.

Likewise, Dr. Samuel Saxton, Pritchard's psychologist, supplied a Declaration which stated:

> Pritchard presented symptoms of major depression which substantially limited her ability to function and which consisted of marked fatigue, lack of energy, lack of interest, poor concentration, memory problems, suicidal thoughts, depressed affect and irritability. These symptoms, although somewhat alleviated by medication, continued until at least June, 1993.

Decl. of Saxton, p. 2 (emphasis added).[8] R-3-61-7, p. 2. The declaration further stated that Pritchard was diagnosed as having "major depression, recurrent, with suicidal thoughts, and that she had difficulty sleeping." It also is noted that Pritchard continued to be treated for her medical condition. Pritchard also presented the Declaration of her husband, James Pritchard, which affirmed the above evidence. Dr. Virginia Pascal, also supplied a Declaration relative to Ms. Pritchard's dysautonomia and its effect. Finally, Pritchard presented evidence that **on April 4, 1993,** Dr. Neville executed an "Attending Physician's Statement of Disability" identifying Pritchard as having "major depression, recurrent with low energy, nervousness and taking medication on a daily basis." R-3-61-7, p. 2; R-3-61-8; R-3-61-11; R-3-61-17.

The District Court, however, granted SCSI's motion for summary judgment, obviously either ignoring or discounting Pritchard's evidence. R-4-86, p. 2.

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8. As SCSI is well aware, at the time Pritchard's submission in response to SCSI's motion for summary judgment was due, Dr. Neville was critically ill with cancer. Thus, Saxton, a fully licensed psychologist who was in private practice with Dr. Neville and who was already familiar with Pritchard, reviewed Pritchard's file and communicated with Dr. Neville in order to render his opinion regarding Pritchard's condition. R-3-61-7.

After reviewing the record, the Eleventh Circuit reversed the District Court's decision and found that Pritchard's evidence had raised a genuine issue of material fact regarding the existence of a disability. It remanded the case for further proceedings. SCSI filed a Petition For Rehearing and Suggestion of Hearing *En Banc*, which was denied. SCSI now mischaracterizes several of the court's holdings in an attempt to secure review by this Court.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S OPINION REGARDING THE DEFINITION OF DISABILITY IS CONSISTENT WITH THE STATUTORY CONSTRUCTION OF THE AMERICANS WITH DISABILITIES ACT AS WELL AS HOLDING FROM OTHER CIRCUITS.

At the onset, it must be remembered that the court below merely ruled on the straightforward and relatively common issue of whether Pritchard had produced sufficient evidence that she was disabled in order to withstand a motion for summary judgement. However, SCSI's now attempts to overstate the court's ruling, alleging that the Eleventh Circuit made certain findings regarding Pritchard's evidence which, in fact, the Eleventh Circuit Court of Appeals never found, nor considered. In reality, the Eleventh Circuit Court of Appeals simply reviewed the evidence in the light most favorable to Pritchard, as it was required to do, and concluded that several issues of material fact remained. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Pritchard was "not required to prove her case" in order to prevail. *Harris v. H & W Contracting*, 102 F.3d 516, 521 (11th Cir. 1996). Since the court in *Pritchard* simply rendered an opinion on a routine and well established principle of law, no review is needed.

The Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and the Rehabilitation Act of 1973 was enacted primarily to place persons with disabilities on equitable footing with persons without disabilities in a variety of settings, including

in the critical area of employment. 42 U.S.C. § 12101, *et seq.*, 29 C.F.R. § 1630.1, *et seq.* Congress was extremely concerned not only about employment discrimination but about "archaic attitudes" held by people insensitive to the plight of persons with disabilities. *School Board of Nassua County, Fla. v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).[9]

As recognized by the Eleventh Circuit, in order to be protected by the aforementioned statutes, Pritchard must demonstrate that she is a person with a disability, as that term is defined by the ADA and Section 504.[10] 42 U.S.C. § 12012(2) states that "the term 'disability' means (a) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (b) a record of such impairment; or (c) being regarded as having such an impairment."

A physical or mental impairment is broadly defined and includes virtually any disability, including depression or any mental or psychological disorder. 29 C.F.R. § 1630.2(H). 29 C.F.R. § 1630.2(A). Further, the issue of the existence of a disability must be determined "without regard to mitigating measures such as medicines. . . ." *Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans With Disabilities Act* (hereinafter "Appendix"), 29 C.F.R. § 1630.2(H). *See also* S. Rep. No. 101-116, 101st Cong. 1st Sess. at p. 23; H. Judicial Rep. No. 101-485, Part 3, 101st Cong. 2nd Sess. at p. 28; *Canon v. Clark*, 883 F. Supp. 718 (S.D. Fla. 1995); *Lift v. Secretary of Transportation*, 5 NDLR 405 (D.D.C. 1994). When a person has more than one disability, the proper inquiry is whether the combination of the disabilities substantially limit any major life activity. EEOC Compliance Manual, § 915.002 at p. 35. Applying the regulations, the Eleventh Circuit and District Court correctly found that Pritchard's depression

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9. SCSI receives federal financial assistance in the form of funds from the Department of Energy.

10. The two statutes define the term identically. *See* 29 U.S.C. § 706. Thus, further reference to the ADA will incorporate Section 504's definition.

constituted a "mental impairment" under the ADA. R-86, p. 11. Pritchard also presented substantial evidence that her dysautonomia, too, is an impairment under the ADA. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(h).

"Major life activity" means the basic activities that the average person can perform with little or no difficulty. EEOC Compliance Manual § 902-2 at p. 14. The term is broadly defined and it can include performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(I); *Best v. Shell Oil Co.*, 9 NDLR 171 (7th Cir. 1997). This list is not exhaustive and other activities can include sitting, standing, lifting, reaching, or having the ability to engage in normal social relations. *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992); 29 C.F.R. § 1630.2(I), Appendix. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993). Mental and emotional processes such as thinking, concentrating, and interacting with others, are other examples of major life activities. EEOC Compliance Manual § 902.3 at p. 15.

In this case, the District Court correctly found that functioning, sleeping, concentrating, and communicating were major life activities. The Eleventh Circuit, acknowledging the existence of such major life activities, found that, Pritchard also presented evidence that her ability to, *inter alia*, communicate, concentrate and sleep were significantly affected. The court also noted that Dr. Saxton had stated that Pritchard had marked fatigue, lack of energy and interest, poor concentration and communication, memory problems and suicidal thoughts.

Contrary to SCSI's mischaracterization, the Eleventh Circuit clearly stated that an impairment must be examined on a case-by-case basis and that Pritchard's depression must substantially limit a major life activity in order to be protected by the ADA. To determine whether a condition significantly restricts a major life activity, the proper analysis is whether the impairment significantly restricts the manner or duration which the individual may perform

the activity, as compared with the average person. 29 C.F.R. § 1630.2(1). The regulations also indicate that it is important to examine "the nature and severity of the impairment, the duration or expected duration of the impairment and the long- term or permanent impact of the impairment." It is also important to look at the residual effects of an impairment. 29 C.F.R. § 1630.2(J), Appendix.

There can be no doubt that Pritchard presented evidence that the nature and severity of her disabilities extremely limited her overall functioning in a variety of areas, including her ability to care for herself. The evidence also demonstrated significant difficulties with Pritchard's mental and emotional process, and her concentration, and her communication with others. Especially when assessing the evidence in the manner most favorable to Pritchard, which was the standard imposed upon the Eleventh Circuit, there can be no question that Pritchard presented substantial evidence demonstrating that she had a multitude of symptoms which, especially without medication, severely limited her ability to perform a variety of major life activities. Among the most notable limitations was evidence indicating Pritchard had **profound** fatigue, **uncontrollable** crying and **suicidal ideation.** She also had a lack of interest, lack of energy, poor communication, and memory deficiencies. Pritchard and Dr. Saxton affirmatively explained how these conditions substantially limited Pritchard's ability to function. Moreover, given Pritchard's suicidal ideation, it is a reasonable inference that without medication, Pritchard might not be alive.

Further, the length of time Pritchard had major clinical depression and dysautonomia, from 1990 until at least her deposition in June 1994, demonstrates that Pritchard's impairments were of long-term duration, with corresponding impact. As of April 1993, Dr. Neville diagnosed Pritchard as having "major depression, recurrent, with suicidal thoughts" and he had prescribed medication to control its affects. Even with the medication, however, Pritchard's symptomology continued and, again, it included **marked** fatigue, **lack** of energy, **lack** of interest, poor concentration, memory

problems, suicidal thoughts, depressed affect and irritability.[11] This is true despite the fact that Pritchard had already received extensive and long term treatment for these impairments. Thus, Pritchard's evidence was far more than a simple conclusionary statement, as Pritchard extensively described her limitations and supported them with medical evidence.

Further, the residual effects of Pritchard's condition demonstrates that she is disabled. Pritchard has needed to continue to rely on medication for several years and she is indefinitely restricted as to the type of work she can perform. Further, SCSI made the decision that Pritchard could not perform any work from January to June 1993, and based its termination on her condition. *See* EEOC Compliance Manual § 915.002 at p. 33, (which recognizes that a disability may have a long term impact on an individual by limiting her ability to perform one or more major life activities indefinitely.) Thus, the Eleventh Circuit's opinion that the issue of whether Pritchard was disabled was a question for the jury, is consistent with the plain language of the ADA.

Additionally, the Eleventh Circuit's decision is extremely consistent with opinions of other court's regarding the potential debilitating effect major clinical depression can have on an individual. More than one court has also noted the debilitating nature of major clinical depression. *In Lift v. Secretary of Transportation, supra*, the plaintiff, like Pritchard, had major depression of long-standing duration. Rejecting defendant's contention that the proper inquiry was whether medication controlled plaintiff's condition, the court characterized defendant as trivializing the symptoms of plaintiff's depression in light of its "universal" recognition as a "significant" impairment. 5 NDLR at p. 1308.

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11. Nor does Pritchard's impairment need to be permanent. EEOC Compliance Manual, § 915.002 at pp. 29-30. It is enough if the impairment lasts several months, is indefinite or unknown. *See also Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996)

Finally, and contrary to SCSI's argument, the fact that Pritchard was able to perform certain jobs which required communication and concentration skills, does not mean an absence of a factual issue on the existence of a disability. As the Eleventh Circuit Court of Appeals noted, an individual can be both limited in her ability to communicate and, especially with the help of medication, still be able work. The fact that Pritchard is limited in her ability to communicate does not mean that she *cannot* effectively communicate. For example, an individual with a profound hearing impairment is unquestionably substantially limited in his ability to communicate. Does that mean such individual is not qualified to perform in any position requiring the ability to communicate? Of course not! The entire purpose of the ADA is to assure employment opportunities for persons with such limitations, with or without reasonable accommodations. In fact, the ADA anticipates that employees who are significantly limited in their ability to perform certain job duties, are, nonetheless, protected by the Act.[12] *See Milton v. Bob Maddox Chrysler, Plymouth, Inc.*, 868 F. Supp. 320 (S.D. Ga. 1994), wherein the court rejected an employer's argument that a plaintiff with a cancerous tumor, was not "disabled" because he was both able to work and engage in the same activities he performed prior to developing the condition.

Several courts, including the Eleventh Circuit's decision in *Harris v. H & W Contracting, supra*, have reached decisions consistent with the court's decision in *Pritchard*. In *Harris*, the court found that a woman with Graves Disease who arguably had less severe symptoms then Pritchard, had raised sufficient issues of material fact to preclude summary judgment. Likewise, other courts have found summary judgment inappropriate where, as here, plaintiff has presented evidence of the existence of an impairment which substantially limits a major life activity. *See Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596 (D. Maine 1994) wherein the court found a material issue of fact regarding whether plaintiff's

12. Even if these abilities constituted essential functions for certain positions, the District Court failed to consider any potential reasonable accommodations which would have allowed Pritchard to perform the positions.

cancer substantially limited a major life activity. *See also Perez v. Philadelphia Housing Authority*, 677 F. Supp. 357 (E.D. Pa. 1987), wherein the court, based on the plaintiff's and her physicians' statements regarding her impairment, found that she was substantially limited in several major life activities; *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983). At least one court has held that the issue of the existence of a disability is a "highly fact-sensitive, determination," *Dutton v. Johnson City Bd. of County Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994). *See also Runnebaum v. Nationsbank of Maryland, N.A.*, 8 NDLR 335 (4th Cir. 1996).

In conclusion, SCSI attempts to raise an issue where there is none. At no time did the Eleventh Circuit Court of Appeals imply that Pritchard's limitations did not have to be substantial. Rather, the Eleventh Circuit's finding is simply that Pritchard had presented sufficient evidence to create a material issue of fact regarding whether she had a medical condition which significantly restricted at least one major life activity. Indeed, based upon the abundant evidence presented by Pritchard, the court's decision was entirely in keeping with the ADA and does not conflict with any other Circuits.

II. THERE IS NO SPLIT IN THE CIRCUITS REGARDING ANY OBJECTIVE EVIDENCE REQUIREMENT.

The court's decision is also entirely consistent with decisions by the other Circuits relative to the issue both of what constitutes a disability as well as the type of evidence necessary to create a factual issue. Quite simply, there is no "split" regarding the issue of the so-called "objective" evidence requirement. Finally, an analysis of the cases relied upon by SCSI does not support its argument.

The primary decision relied upon by SCSI is *Beasley v. Indiana Bell Telephone Co.*, 1996 U.S. App. LEXIS 4956 (7th Cir. 1996). Severely narrowing the issue before it, the Seventh Circuit held only that *Beasley* presented no evidence of what his symptoms

entailed or why they significantly restricted any of his life activities. Further, and contrary to SCSI's assertion, *Beasley* did not require that objective evidence be present in each case. Rather, it found only that *Beasley* had submitted no evidence that his symptoms, even when acute, substantially limited any major life activity. However, the court also noted "when the merits of a complaint involving subjective issues such as credibility, state of mind and motivation—where the critical element lies within the control of the movement—summary judgment may be inappropriate." 1993 U.S. App. LEXIS 4956, *1. The court also indicated that it would have likely reached a different opinion if *Beasley*, like Pritchard, had presented evidence from those who were familiar with him and the symptoms he experienced when he became ill.[13]

Dutcher v. Ingall's Shipbuilding, 53 F.3d 723 (5th Cir. 1995) is equally distinguishable. Both Dutcher and her doctors readily acknowledged that her impairment caused no impact on her daily functioning. Further, "picking up little things from the floor" or "holding them up high" or "real tight" hardly equates with profound fatigue, lack of interest, uncontrollable crying, or suicidal ideation. *Dutcher*, does not even discuss any so-called "objective evidence" requirement. Finally, in *Roth v. Lutheran General Hospital*, 57 F.3d 1449 (7th Cir. 1995), the evidence from his doctors did not substantiate plaintiff's statement of his limitations. Again, Roth's doctors were unable to support Roth's limitations without relying on Roth's assertions and notably, the court found that Roth was not creditable.[14]

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13. Further, notably absent from SCSI's discussion of the law in the Seventh Circuit, is *Best v. Shell Oil Co., supra*. In *Best*, the court found a material issue of fact where a truck driver with an injured knee was limited in the major life activity of working. Indeed, the Seventh Circuit decision in *Shell* is extremely consistent with *Pritchard*, especially since it seems that Best's impairment was less limiting than Pritchard's.

14. SCSI also fails to mention *Homeyer v. Stanley Tulchin Associates, Inc.*, (Cont'd)

Further, even if so-called "objective evidence" was required, Pritchard's evidence, which included statements from Dr. Neville and Dr. Saxton, as well as her husband, regarding the existence and effect of her disability on her everyday life, constituted sufficient evidence.

In conclusion, there is no requirement that Pritchard present any so-called "objective" evidence so long as she presented sufficient evidence of the existence of a condition which substantially limits at least one major life activity. SCSI has attempted to create a conflict where there is none, and thus, there is no need to belabor the point further.

III. THE ELEVENTH CIRCUIT DID NOT HOLD THAT THE MERE USE OF MITIGATING MEASURES AUTOMATICALLY PROVES THE PRESENCE OF A DISABILITY.

Astonishingly, SCSI accuses the court of holding that any individual with a medical condition which utilizes a mitigating measure is **automatically** deemed eligible under the ADA. Even a cursory review of the Eleventh Circuit's decision indicates that it never reached this conclusion. Consequently, there is absolutely no reason for this Court to exercise jurisdiction on this issue, as SCSI has seriously misstated the court's holding.

As explained previously, the general rule under the ADA is that the existence of a disability is to be examined without the use of mitigating measures such as medication. *Harris v. H & W Contracting*, 102 F.3d 516 (11th Cir. 1996). 29 C.F.R. § 1630.2(J), Appendix. The existence of this rule is academic, however, because

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(Cont'd)

8 NDLR 264 (7th Cir. 1996) wherein an employee who was sensitive to environmental tobacco smoke pled sufficient facts to demonstrate a substantial limitation in an activity other than working.

even with medication Pritchard presented substantial evidence that she was significantly limited as described above.

In reaching its opinion, the court noted that Pritchard experienced the above-described symptoms and resulting limitations, for which Pritchard was still taking medication in June 1994. In acknowledging Pritchard's evidence, the Eleventh Circuit **never held** that the existence of Pritchard's medication, **automatically** meant that Pritchard was disabled. Rather, the court simply held that even with the use of medication, Pritchard had presented sufficient evidence to demonstrate an issue of material fact.[15] That was the extent of the court's holding, and despite SCSI's mischaracterization of its ruling, there is simply no need for the court to exercise jurisdiction regarding this issue.[16]

IV. THE ELEVENTH CIRCUIT'S FINDING THAT SUFFICIENT EVIDENCE EXISTED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT REGARDING SCSI'S PERCEPTION OF PRITCHARD AS DISABLED IS CONSISTENT WITH THE ADA AND THE OPINIONS OF OTHER CIRCUITS.

After reviewing the record, which included evidence that SCSI continually refused to accommodate Pritchard by allowing her to return to work, the Eleventh Circuit held that Pritchard had presented sufficient evidence that SCSI perceived Pritchard as possessing a

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15. Of course, it is a reasonable inference that without medication, Pritchard's symptoms would be worse.

16. SCSI's reliance on *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) is misplaced. In *Chandler*, unlike here, plaintiff testified that as a result of taking insulin that he experienced no limitation in a major life activity. Moreover, the Fifth Circuit in *Chandler*, specifically declined to determine whether a person with a disability who was dependant on insulin was *"per se"* disabled under the ADA. 2 F.3d at 1391. *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995) merely restates the general rule regarding mitigating measures with which Pritchard has no quarrel.

disability and/or that she had a record of such, to create a genuine issue of material fact on these points. Again, SCSI attempts to confuse the record by overstating the court's ruling and neglecting to mention the standard imposed upon the court by Fed. R. Civ. P. 56.

In reaching its conclusion, the Eleventh Circuit's opinion is entirely consistent with the ADA's statutory language, its legislative history and the decisions of other Circuits. Contrary to SCSI's characterization of the court's opinion, the Eleventh Circuit **never held that "leave alone" automatically** establishes a perception of a disability.

In addition to protecting persons who actually have a disability, the ADA also protects persons with a record of an impairment or those who are perceived as impaired. 42 U.S.C. § 12102(2).[17] *School Board of Nassau County, Fla. v. Arline, supra.* Indeed, Congress intended that discrimination would include an employer's decision to deny an employee a particular job based on the fact that the employer regarded the employee as having a disability. H.R. Rep. No. 101-485, Part 3, 101st Cong., 2nd Sess. 30 (1990). It is not necessary for an employee to demonstrate that she unsuccessfully sought a myriad of jobs. According to both the ADA's legislative history, and the EEOC's Interpretive Guidance, the "regarded as" test will be satisfied if, "an employer makes an employment decision based on a myth, fear, or stereotype." If an employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or sterotype" can be drawn. 29 C.F.R. § 1630(L), Appendix. *See also* Tucker and Goldstein, *Legal Rights of Persons With*

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17. Having a record of a disability includes having a history of such. 29 C.F.R. § 1630.2(K). Persons are "regarded as having an impairment if they are treated . . . as if they were handicapped — regardless of their actual condition." *Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir. 1991). Congress acknowledges that some impairments are disabling due to the attitude of others. *Muller v. Hotsy Corp.*, 917 F. Supp. 1389 (N.D. Iowa 1996).

Disabilities: An Analysis of Federal Law, L.R.P. Publications, 1993. Further, if an employer's rationale, as is true here, tends to demonstrate the employer's belief that an employee is unable to perform a wide range of positions, then the employee is entitled to the ADA's protection.[18] The legislative history also states that an employee does not have to prove that an employer's belief is wrong. EEOC Compliance Manual § 915.002 at p. 44.

The importance of recognizing these additional categories of disabilities was underscored in *School Board of Nassau County, Fla. v. Arline, supra*, wherein this Court held that these categories served as important public policy considerations as the perception of others can be as stigmatizing as an actual impairment. Significantly, this Court also found that an individual who experienced a hospitalization for tuberculosis had a record of an impairment. Consequently, the Eleventh Circuit's holding is consistent with *Arline.*

Pritchard was first granted leave at her own request in April 1992. There is no dispute that she was unable to perform in any position until her doctor released her to return to work, with restrictions, in January 1993. However, SCSI ignores the fact that **it was SCSI who required Pritchard to remain on unpaid disability leave for approximately five (5) additional months after her release, and that it terminated her,** despite Pritchard's continued request to transfer to a position for which she was qualified. Although, SCSI tries to characterize the entire leave period

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18. The correct analysis regarding this aspect is in the attitudes of others. *See Muller v. Hotsy Corp., supra*, where the court found an issue of fact based on, *inter alia*, the employer's testimony that it regarded the employee as disabled and that it refused to allow *Muller* to perform in a variety of positions. Likewise, in *Cook v. Rhode Island Dept. of MHRH*, 10 F.3d 17 (1st Cir. 1993) an employee was covered by the ADA not because she actually had a disability which substantially limited a major life activity, but because the employer believed that the employee's obesity prevented her from performing certain job duties. *See also McGinnis v. Wonder Chemical Co.*, 7 NDLR 290 (E.D. Pa. 1995).

as being at the request of Pritchard, the records clearly states that from January 1993 until the present, Pritchard did not want to be on unpaid leave; **she wanted to work.**

SCSI attempts to characterize the Eleventh Circuit's opinion as holding that leave **automatically** demonstrates that an employer perceives a disability, even if an employer is simply "acquiescing" to an employee's request. Not only is this mischaracterization contrary to a plain reading of the court's decision, it also ignores the record. Rather, after reviewing the record and consistent with Fed. R. Civ. P. 56(f), the court held only that the above evidence raised a genuine issue of material fact on SCSI's perception of Pritchard as disabled. No where in its decision did it find Pritchard's leave automatically established the existence of a disability, and SCSI's description of the Eleventh Circuit's holding can be read only as an attempt to create an issue for review where none exists.

Moreover, Pritchard is not arguing that her perception of herself is controlling, nor can the court's decision be read in this manner. Again, SCSI ignores the extensive evidence that it was **the employer who refused to allow Pritchard to transfer to any position, due to SCSI's perception that Pritchard's restrictions prevented her from performing the essential functions of any job within the company.** Further, Prince and Welliver expressly testified that Pritchard's disabilities interfered with Pritchard's ability to work, and that she was "covered" by the ADA.

SCSI's reliance on *Gray v. Ameritech Corp.*, 937 F. Supp. 762 (N.D. Ill. 1996) to create a split in the Circuits, is astonishing, first as it is only a District Court decision, and second, as the court in *Gray* ultimately found sufficient evidence to create a factual issue on Gray's employer's perception. Further, its holding is distinguishable from *Pritchard*, to the extent that it was **the employee** who requested the entire period of disability leave and her employer accommodated her by allowing her to return to work.

Unlike here, there was no evidence that Gray's employer believed Gray to be so disabled to prevent her from working in any position.[19]

Moreover, SCSI cannot realistically argue that SCSI thought only that Pritchard could not do one specific job. Indeed, SCSI terminated Pritchard because it perceived that her restrictions prevented her from performing the duties of **any** position, due to SCSI's insistence that all engineers have the ability to accept such assignments. As stated in the EEOC Compliance Manual, an employer's "actions may speak louder than words." EEOC Compliance Manual § 915.002 at p. 46.

Additionally, Pritchard obviously had a record of major clinical depression and she also, has a history of the condition, having been so medically diagnosed, and having received continuous treatment for depression until the time of her termination. *See* EEOC Enforcement Guidance.

SCSI's reliance on *Byrne v. Board of Education School of West Allis-West Milwaukee*, 979 F.2d 560 (7th Cir. 1992) is interesting, as its holding, too, tends to support Pritchard's position. Although Byrne failed to convince a jury she suffered discrimination, the court's final holding was that plaintiff had presented sufficient evidence that she had: (1) a disability; (2) a record of such; and (3) was so perceived, to enable those issue to be presented to a jury. During plaintiff's post-trial motion for directed verdict, the court reviewed all evidence in the light most favorable to the nonmovant, and stated that it would reverse only if no genuine issue of material fact existed and plaintiff was entitled to judgment. Of course, this is not the standard employed with *Pritchard*, where Pritchard argued

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19. Likewise, Pritchard has no quarrel with SCSI's assertion that the definition of disability varies under different statutes or that some employees who have taken leave may not be disabled. Such does not undercut Pritchard's assertions, however, that the totality of the record demonstrates sufficient evidence that SCSI perceived her as disabled to avoid summary judgment.

that her evidence, when viewed most favorably to her, created an issue of fact.[20]

Further, in arguing that Pritchard conflicts with the Seventh Circuit, SCSI again neglects to mention *Best v. Shell Oil Co., supra*, wherein the Seventh Circuit found an issue as to Shell's perception when Shell placed Best on disability leave and would not let him work. The holding in *Best*, thus, defeats SCSI's argument that there is a split in the Circuits.

Contrary to SCSI's assertion, the Eleventh Circuit's decision is also consistent with other courts which have denied summary judgment when, as here, a factual issue exists regarding whether an employer perceived an employee to have a disability. This is especially true where an employer's perception has caused it to limit an employee's job duties. *See McGinnis v. Wonder Chemical Co.*, 1995 U.S. Dist. LEXIS 18909 (E.D. Pa. 1995) (The court found an issue of fact existed wherein an employer refused to allow an employee who had been out on leave to return to work with restrictions). *See also EEOC v. Joslyn Manufacturing Co.*, 8 NDLR 199 (E.D. Ill. 1996) (The court found that an issue of material fact existed when an employer restricted an employee with carpal tunnel syndrome from performing in a number of positions. The test to determine perception is highly individualized.); *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442 (E.D. La. 1994) (The court found summary judgment inappropriate where sufficient evidence existed that the employer accepted an employee's doctor's diagnosis of depression and perceived plaintiff as limited in her ability to work); *Sigurdson v. Carl Bolander & Sons*, 511 N.W. 2d

20. Other cases relied upon by SCSI are also not on point. In *Stewart v. County of Brown*, AD cases BNA 1018 (7th Cir. 1996) the reason plaintiff was transferred was due to performance problems and plaintiff failed to offer any evidence of pretext. Moreover, the employer allowed plaintiff to return to work after being cleared by the doctors. Finally, Stewart, himself, agreed with the lack of evidence relating to perception and acknowledged that the dispute between he and his employer was a personality conflict. *Kelly v. Drexel University*, 94 F.3d 102 (3rd Cir. 1996) is also not controlling as plaintiff's only evidence of a disability was that he had a visible limp.

482 (Minn. Ct. App. 1994) (sufficient evidence existed to demonstrated that Sigurdson was perceived by his employer as being disabled when his employer denied him a job because of his diabetes); *Zambelli v. Historic Landmarks, Inc.*, 6 NDLR 194 (E.D. Pa. 1995) (the court denied summary judgment wherein plaintiff presented "a chain of circumstantial evidence" that her employer believed she had a disability); *Runnebaum v. Nationsbank of Maryland, N.A., supra* (an employer's knowledge that Runnebaum who was asymptomatic, was HIV positive, and was taking medication to control the fatal condition, was sufficient evidence to support an inference of perceived disability); *Roe v. District of Columbia*, 842 F. Supp. 563, 568 (D.D.C. 1993) (the court found that an employer who restricted a firefighter from performing specific duties as a result of his HIV status was "regarded as" having a handicap. Defendant's argument that he did not regard plaintiff as having an impairment was "difficult to understand and impossible to accept"); *Overturf v. Penn Ventilater Co., Inc.*, 8 NDLR 196 (E.D. Pa. 1996) (wherein the court found an issue of fact based on an employer's statements to plaintiff about her health.)

In conclusion, this Court should not exercise jurisdiction over SCSI's petition, as no valid reason exists for doing so. SCSI has mischaracterized the Eleventh Circuit's ruling in an attempt to create non-existent issues in an "last ditch" effort to appeal. The reality is that the Eleventh Circuit's decision is consistent with the case law in other Circuits and the plain language of the ADA.

V. THE ELEVENTH CIRCUIT PROPERLY REMANDED PRITCHARD AS NO ALTERNATIVE GROUNDS EXISTED FOR AFFIRMING SUMMARY JUDGMENT.

The Eleventh Circuit properly remanded *Pritchard* as no alternative grounds existed for affirming summary judgment. Indeed, Pritchard presented significant evidence that she was qualified to perform the essential functions of several positions to which she could have transferred. 42 U.S.C. § 12111(8). Pritchard also presented substantial evidence that SCSI failed to accommodate her by refusing to transfer her to any number of vacant positions to

which she was qualified, and instead terminating her based on her disability. The Eleventh Circuit correctly stated that the controversy regarding whether all engineers must have the flexibility to accept nuclear work would have to be resolved by a jury. (*See* footnote 1.) Further, the court stated that a failure to provide a reasonable accommodation by way of a transfer can constitute discrimination. 42 U.S.C. § 12112. (*See* footnote 5.) At the very least, several genuine issues of material fact exist on these points, making remand appropriate.

CONCLUSION

Based on the foregoing, Respondent Pritchard respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari and remand the case for trial.

Respectfully submitted,

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